IN THE

Supreme Court of the United States

October Term, 1939.

No. 1069 77

LUMBERMENS MUTUAL CASUALTY COMPANY, a corporation,

Petitioner,

vs.

MRS. LEOTIA E. McIVER, JEFF CLARK, GRACE VAUGHN, a minor, and LORAINE JOHNSON,

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioner, Lumbermens Mutual Casualty Company, a corporation, respectfully shows:

I.

Summary Statement of the Matters Involved.

This is an action for declaratory relief brought by petitioner against respondents in the District Court for the Southern District of California, Central Division, seeking judicial determination of its nonliability upon a policy of automobile insurance issued by petitioner to respondents McIver and Clark upon an automobile owned by McIver,

The car in question had been involved in an accident in Los Angeles County, California, wherein one Loraine Johnson was injured. At the time of the accident, the respondent Grace Vaughn, a minor, of the age of fourteen years, and without a state license to drive an automobile, was in the driver's seat. In the front seat were also the respondent Jeff Clark and one Maxine Vaughn.

Loraine Johnson brought suit in the Superior Court for Los Angeles County against the respondents herein for damages allegedly resulting from this accident. [R. 39-43.]

While this state court action was pending, petitioner filed the instant suit for declaratory relief, and more specifically prayed that petitioner be exonerated from defending the state court action and be adjudged not obligated to satisfy any possible judgment which plaintiff in the state court action may subsequently obtain. [R. 2-4, 32.]

Petitioner in its complaint particularly relied on an "exclusionary clause" in its policy covering the car in question, which provided as follows:

"EXCLUSIONS.

"This policy does not apply: . . .

"(c) Under any of the above coverages while the automobile is operated by any person under the age of fourteen years, or by any person in violation of any state, federal or provincial law as to age applicable to such person. . . ." [R. 4, 5, 18.]

The complaint then alleged "that at the time of said accident, the automobile described in said policy of insurance was being driven and operated by the defendant Grace Vaughn, a minor . . ." [R. 5], and further

> "that plaintiff is informed and believes and therefore alleges that the defendant Grace Vaughn was at the time of the accident aforementioned of the age of fourteen (14) years; that said Grace Vaughn did not at said time, to-wit, on the 26th day of January, 1939, possess an operator's license issued by the State of California to operate a motor vehicle within said state, and had not at any time prior to the date of said accident applied or made application for a permit to drive motor vehicles as provided for in the Vehicle Code of the State of California". [R. 7.]

The Answer of the respondents McIver and Clark (respondent Vaughn filed no answer) denied that at the time of the accident the car was operated by Grace Vaughn, but on the contrary alleged that

> "said automobile was operated by defendant Jeff Clark . . . and that at the time and place aforementioned that the defendant Jeff Clark was instructing, assisting and teaching said Grace Vaughn to drive, operate and use said automobile." [R. 33.]

The trial was by court without a jury. The principal testimony was given by Jeff Clark as a witness for petitioner [R. 77-119], and as a witness for respondent [R. 142-147]; by Grace Vaughn as a witness for the respondents [R. 123-134], and by Maxine Vaughn (the third passenger in the car) as a witness for respondents. [R. 134-142.]

Findings of Fact and Conclusions of Law favorable to the respondents were approved by the trial judge. [R. 61-68.]

The trial judge made the following pertinent Findings of Fact:

> "5. That on or about the 26th day of January, 1939, and during the effective period of said policy of insurance, the automobile described in said policy was involved in an accident at the intersection of Fourteenth and Montana Streets in the city of Santa Monica, county of Los Angeles, state of California, with Loraine Johnson, who was a pedestrian at that time and place; that said Fourteenth Street runs in a general easterly and westerly direction; that said Montana Street runs in a general northerly and southerly direction; that for about twenty minutes prior to the accident, defendant Jeff Clark had been giving defendant Grace Vaughn a lesson in driving; that Grace Vaughn was sitting at the extreme left-hand side of the front seat behind the wheel; that Jeff Clark was seated next to Grace Vaughn and Grace Vaughn's sister Maxine, who was seated at the extreme right-hand side of the front seat; that defendant Jeff Clark was closer to Grace Vaughn than to Maxine Vaughn, and his back was turned to Maxine as he sat facing Grace, giving her directions in handling the car; that the car proceeded in a westerly direction on Fourteenth Street and, approximately eighty feet from the intersection, the car was traveling down an incline, which sloped toward Montana Street, at a speed of about twenty-five miles per hour; that approximately eighty feet from the intersection Grace Vaughn applied the brakes; that the automobile slowed momentarily; that the brakes held for just a moment and then released; that Clark glanced down and saw that

Grace Vaughn's foot was on the brake pedal and that the brake pedal was depressed to the floor board, and that the car's speed was accelerating; that there were several westbound automobiles on said Fourteenth Street which were stopped at said intersection of the easterly side thereof and on the north half of said Fourteenth Street; that when the automobile described in said policy was within approximately forty feet to the east of said stopped westbound automobiles, Jeff Clark seized the steering wheel with both hands and swerved the automobile described in said policy to the left and over to the south side of said Fourteenth Street and past said stopped automobiles; that while on the south side of said Fourteenth Street at its intersection with said Montana Street, the automobile described in the policy struck Loraine Johnson; that at the time of the impact the car was proceeding at a speed of approximately twenty-five miles per hour, having picked up speed because of the incline down which it was proceeding; that after said impact the automobile described in the policy was steered by Jeff Clark across the intersection and back to the north side of said Fourteenth Street where he brought it to a stop; that prior to the impact and while Jeff Clark was steering the automobile described in said policy, he reached, with his left hand, across Grace Vaughn's lap for the emergency brake lever of the automobile described in said policy and applied the said emergency brake lever; that said emergency brake lever is located on the left-hand side of the steering wheel of the automobile described in said policy; that after Clark seized the steering wheel Grace Vaughn did not attempt to steer the car or to operate the clutch or brake pedal; and said automobile was brought to a stop by Jeff Clark; that said Grace Vaughn was at the time of the accident of the age of fourteen years and four

months, and was not licensed to operate a motor vehicle within the State of California, and had not at any time prior to the date of said accident applied or made application for a permit to drive a motor vehicle, as provided for in the Vehicle Code of the State of California."

"10. That the automobile at the time of the accident was operated by said Jeff Clark and was not operated by any person in violation of the Vehicle Code of the State of California, that said automobile at the time of said accident was not operated by said Grace Vaughn."

A Judgment for the respondents was rendered and filed. [R. 69-70.] A Memorandum Opinion was written by the trial judge. [R. 48-60, reported in 27 Fed. Supp. 702.]

Petitioner took an appeal to the Circuit Court of Appeals for the Ninth Circuit, which court affirmed the judgment as of March 8, 1940. (Opinion not yet in official reports.) A Petition for Rehearing was denied on April 13, 1940. [R. 171.]

The Opinion of the Circuit Court of Appeals treated the case as one merely involving an effort by petitioner (appellant therein) to substitute its own opinion of the evidence adduced by the record for that of the District Court, saying:

"It is undisputed that if the court was right in his finding that the car was operated by Jeff Clark, the relief requested by the plaintiff could not have been granted. On the other hand, under the case of Brown v. Traveler's Ins. Co., 31 Cal. App. (2d) 122, if the minor was operating the car the policy did not cover

the accident and the relief requested would be proper. Thus we are confronted with a question of fact and unless the trial court was clearly wrong we cannot disturb its finding". (Adv. Op. page 2.)

The Opinion proceeds to quote at great length from the Memorandum Opinion of the trial judge as to the basis for Finding of Fact No. 10, namely:

> "10. That the automobile at the time of the accident was operated by said Jeff Clark and was not operated by any person in violation of the Vehicle Code of the State of California, that said automobile at the time of said accident was not operated by said Grace Vaughn."

which finding the reviewing court refused to reject, saying:

> "Clark's testimony was sought to be impeached by certain written statements made theretofore by him, but they do not in our opinion justify our rejecting the credit given Clark's evidence by the trial court nor the finding based thereon, . . ."

The court admitted that petitioner herein gave "great weight" to the Supreme Court case of *State Farm Mutual Automobile Ins. Co. v. Coughran* (1938) (303 U. S. 485, 82 L. Ed. 970), but found nothing in that case to affect its conclusions, because:

> "Here, as we have seen, the trial court specifically found that Clark was himself operating the automobile. . . . Upon the point of joint control it suffices to say that the complaint not only does not allege anything in regard to a joint control of the automobile, but specifically contains the allegation 'that at the time of said accident the automobile described in said policy of insurance was being driven and

operated by the defendant Grace Vaughn, a minor. . . .' . . . Nowhere is there an allegation of joint control. The evidence as narrated by the judge in his opinion together with his conclusions, the findings of fact and conclusions of law, and even appellant's statement of points upon which appellant intends to rely on appeal are all silent upon the subject of joint control. The point is first raised in the brief upon appeal. In the circumstances, and since the evidence is not so clearly to the effect that the automobile was under joint control at the time of the accident that we should ourselves inject the issue in the interest of justice, we hold that the issue is not before us."

II.

Reasons Relied On for Allowance of the Writ.

It is respectfully submitted by your petitioner and relied upon as reasons for granting of the writ that:

A. The Circuit Court of Appeals has misconstrued and misunderstood the ruling of this Court in *State Farm Mutual Automobile Ins. Co. v. Coughran* (1938) (303 U. S. 485, 82 L. Ed. 970). Petitioner is confident that the ruling in said case is controlling in the case at bar and so urged on both the District Court and the Circuit Court of Appeals. It is plain that the unanimous court in the *Coughran* case intended to make it clear that where a minor, unlicensed by state laws to drive an automobile, is permitted by the assured to "drive" or "operate" the car covered by insurance contract in direct violation of state

law as well as the provisions of the contract between the parties, the insurer has the right to be exonerated from liability where the policy contains the common and generally used "exclusionary clause," which appears in virtually identical words in the case at bar and in the *Coughran* case.

The question of "joint control" or "joint operation" by the minor and the insured, or of sole operation by the minor, was intended to be of secondary importance, otherwise Mr. Justice McReynolds, speaking for the court in that case, would not have said:

> "If, as found, the automobile was being jointly operated by the wife and the girl, the result was not within the policy. The latter was forbidden by law to operate or drive jointly or singly. If the wife was in control the statute forbade her to permit driving by the girl. *In any view, when the collision occurred the car was being driven or operated in violation of the statutes.*" (Italics ours.) (303 U. S. 485, 491.)

There has theretofore resulted from the decision of the Circuit Court of Appeals in the instant case, a direct conflict with the decision of this court in the *Coughran* case and unless the apparent avenues for further misinterpretation and misconstruction are clarified, added conflict must of necessity follow between the decision of the Supreme Court in the *Coughran* case, of the Circuit Court of Appeals for the Ninth Circuit in the instant case, and of other circuits to whom the interpretation of the "exclusionary clause" in question may be directed.

B. The decision of the said Circuit Court of Appeals, by failing to hold that the trial court's Findings of Fact No. 5 and No. 10 are inconsistent, and by adopting Finding No. 5 as exclusively binding upon it, has in effect permitted the ruling to stand which whittles down to the vanishing line the right of the insurer to rely upon a substantial compliance by the insured with the "exclusionary clause" heretofore referred to, a right clearly and unambiguously approved by the courts of the State of California (*Brown v. Traveler's Ins. Co.*, 31 Cal. App. (2d) 122, 87 Pac. (2d) 377, hearing in Supreme Court denied) and if permitted to stand the ruling of the Circuit Court of Appeals will produce probable conflict with the applicable local decisions on an important question of local law.

C. An important procedural question is involved, namely, what is the proper interpretation to be given to Rule 52(a) of the Rules of Civil Procedure?

If, as most commentators have indicated, Rule 52(a) is intended substantially to adopt the well established principle of equity that the appellate court is not straightjacketed from examining the record to determine whether the findings fairly reflect the same, then the Circuit Court of Appeals in its decision clearly and substantially injured the petitioner's cause by accepting the trial judge's findings as elaborated upon in the trial judge's Memorandum Opinion, practically verbatim, without making any attempt to reconcile, if possible, the apparent conflict between Finding No. 5 and Finding No. 10, and without examining the record to determine whether the findings and conclusions

of law were at all sustained, even though the court admitted that:

> "Upon the point of joint control, it suffices to say that the complaint not only does not allege anything in regard to a joint control of the automobile, but specifically contains the allegation 'that at the time of said accident the automobile described in said policy of insurance was being driven and operated by the defendant Grace Vaughn, a minor. . . .' The evidence as narrated by the judge in his opinion together with his conclusions, the findings of fact and conclusions of law, and even appellant's statement of points upon which appellant intends to rely on appeal are all silent upon the subject of joint control. The point is first raised in the brief upon appeal. In the circumstances, and since the evidence is not so clearly to the effect that the automobile was under joint control at the time of the accident that we should ourselves inject the issue in the interest of justice, we hold that the issue is not before us."

This case presents a timely opportunity for this Court to indicate the proper scope to be given to Rule 52(a). Action taken now will avoid confusion and conflicting interpretations in the Federal judicial system.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, directing that Court to certify and send to this Court for its review and

determination, on a date certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 9294, Lumbermens Mutual Casualty Company, a corporation, Appellant, vs. Mrs. Leotia E. McIver, Jeff Clark, Grace Vaughn, a minor, and Loraine Johnson, Appellees," and that the Judgment of said Court therein be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem proper and just.

Dated: May, 1940.

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Counsel for Petitioner.

C. F. JORZ,
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